

Washington, D.C. 20554

In the matter of the application filed by)
SBC COMMUNICATIONS INC., MICHIGAN)
BELL TELEPHONE COMPANY, and)
SOUTHWESTERN BELL COMMUNICATIONS)
SERVICES, INC., for provision of in-region,)
interLATA services in Michigan.)
_____)

REPLY COMMENTS OF THE
MICHIGAN PUBLIC SERVICE COMMISSION

March 4, 2003

A. Introduction

On January 13, 2003, the Michigan Public Service Commission (Commission) adopted a report concluding that SBC Ameritech Michigan (SBC) complied with Section 271(c) of the federal Telecommunications Act of 1996 (FTA) and the rules and regulations promulgated by the Federal Communications Commission (FCC) related to that section of the FTA. On January 29, 2003, pursuant to the public notice issued by the FCC in regard to SBC's application for authorization to provide in-region, interLATA service in the state of Michigan, the Commission's January 13, 2003 report and recommendation was formally filed with the FCC. Numerous other parties have also provided comment on these matters, including the U.S. Department of Justice (DOJ) on February 26, 2002. Pursuant to the FCC's public notice, the Commission now submits these reply comments.

B. Evaluation of the Department of Justice

On February 26, 2003, the DOJ filed its evaluation in which it concluded that it could not support SBC's Section 271 application based on the current record. It did, however, suggest that the concerns it raised may be satisfactorily addressed by the FCC prior to the conclusion of its review.

The Commission would like to address some of the matters raised in the DOJ evaluation.

First, we believe it is important that the DOJ found that actual competitive entry into the Michigan market is significant. The Commission currently estimates the competitive local exchange carrier (CLEC) market share in Michigan to be in the area of 25%. The DOJ states that actual competition is the first criteria in assessing that local markets are irreversibly open. The Commission believes that this market share may be the highest in any state prior to Section 271 consideration.

Second, the DOJ does not find that compliance with any of the 14-point checklist items was deficient. This too is very significant because this is the statutory standard for determining if a market is irreversibly open to competition.

The DOJ does focus on the possibility that the progress made in Michigan may not be irreversible, given concerns that are then summarized and characterized as serious. As stated in the January 13, 2003 report and the accompanying order issued that day, this Commission's concerns are almost identical to those raised by the DOJ.¹ The critical difference is that this Commission considered the resolution of these matters as desirable enhancements to the competitive landscape in Michigan, not as impediments to Section 271 approval. This Commission found that the legal requirements had been met, that competition in Michigan would be enhanced by SBC's entry into long distance competition, and that the protections against any backsliding were solidly in place.

The difference then is the concern by the DOJ that the currently competitive Michigan market may not stay that way. The DOJ bases its conclusion on issues raised by competitive providers in their comments, and to some degree on statements attributed to the Commission and extracted from the Commission's report.

The Commission agrees with the DOJ that these issues are important, but not that they are evidence of real or potential endangerment to the thriving competitive market in Michigan. Instead, it is precisely this difference which caused the Commission to put into place compliance

¹A copy of the January 13, 2003 Commission order in Case No. U-12320 is attached. In this order, the Commission required that SBC complete the BearingPoint and Ernst & Young performance measure testing and that it further address eight issues. These issues include pre-order processing, line loss notifiers, customer service records, directory listing databases, trouble report closure coding, billing auditability, change management, and line sharing/line splitting. Similarly, the DOJ discussed concerns with five of these issues, including performance measure reliability,

and improvement plans as well as ongoing testing requirements to prevent any backsliding from the competitive market which has been achieved. There is no assurance that competitors and SBC will never have issues. The only assurance that a market will be irreversibly open is the presence of the necessary tools in the hands of a regulatory Commission with the commitment to use the tools to make it work. The record should be clear that the Commission is committed to competition, having spent the last three years and an incredible amount of resources addressing Section 271 issues and facilitating the growth in the competitive market share from 4% to 25%. The Commission has been proactive in such areas as total element long run incremental cost (TELRIC) pricing, performance measurement systems, and expedited dispute resolution.

In support of our position that the progress made over the last few years is not endangered and is irreversible, the Commission offers the following;

- 1) The Commission opened its Section 271 docket in 2000 with a specific set of requirements that SBC would have to meet, including an independent third party OSS evaluation.
- 2) The Commission initiated two comprehensive cost proceedings in Case No. U-11280 in December 1996 and again in Case No. U-11831 in March 1999 in which total service long run incremental cost (TSLRIC)-based prices were established and reviewed for unbundled network elements, resale offerings, and other interconnection services offered by SBC. Prices established in those proceedings have enhanced competition in this state while permitting SBC recovery of its investments and expenses as authorized by both TELRIC and TSLRIC principles.
- 3) The Commission established an initial set of wholesale performance measures in 1999, and several refinements have been adopted since then, resulting in 150 performance measures jointly proposed by SBC and CLECs alike and adopted by this Commission.
- 4) In April 2001, the Commission established a remedy plan calling for automatic penalty payments to the state and CLECs for inadequate wholesale performance.

line loss notifiers, billing auditability, change management processes, and line sharing/line splitting.

- 5) The Commission requires annual audits of the performance measure systems and is considering a requirement to audit remedy payments as well.²
- 6) The Commission has required the continuation of the BearingPoint and Ernst & Young evaluations until the testing is complete and all outstanding exceptions are closed.
- 7) The Commission has required the submittal by SBC of improvement plans to address those issues where it is believed further improvements can be achieved (but which do not rise to the level of Section 271 non-compliance). SBC submitted compliance and improvement proposals on February 13, 2003,³ which will be the subject of collaborative discussions on March 4th and 5th in the Lansing, Michigan Commission offices. A number of CLECs have indicated their intention to participate in these discussions along with representatives of BearingPoint, SBC, and the Commission Staff. As a result of the collaborative discussions, SBC is then required to submit modified plans to this Commission by March 13, 2003. Should further action be required, the Commission will issue additional orders on this matter.⁴
- 8) With the advocacy of this Commission, the Michigan state legislature passed an amendment to the Michigan Telecommunications Act in 2000 providing for the expedited processing and emergency relief for provider-to-provider disputes.⁵ This ability to act quickly serves as an incentive for providers to solve problems on a business-to-business basis because a proceeding cannot be protracted under the terms of the statute.
- 9) The Michigan Attorney General in his comments in this proceeding also pledged to carefully monitor the development of a competitive market in this state.⁶

²Any further order on these matters will be provided to the FCC as soon as it becomes available.

³SBC filed a copy of this submission with the FCC in the subject proceeding on February 19, 2003.

⁴As discussed above in regard to performance measures and remedy plans, any further order regarding compliance plans will be provided to the FCC for its information as soon as it is issued.

⁵Section 203 of the Michigan Telecommunications Act, MCL 484.2203.

⁶See, Comments of Michigan Attorney General Michael A. Cox filed in this proceeding on February 6, 2003.

In particular regard to SBC's performance measures, the Commission reiterates its conclusion that the data reported for the vast majority of the disaggregations on which SBC relied may either be considered accurate on the face of it or to have under-stated the results of those measures.⁷ The Commission also indicated in its January 13th report, as well as in the accompanying order issued on that day, that the Commission would vigorously pursue all portions of the BearingPoint and Ernst & Young testing of SBC's performance measure reporting in order to assure that reported results for all measures are reliable and accurate on an ongoing basis.⁸ In compliance with that order, such activity is proceeding in earnest. As required by its January 13, 2003 order, a progress report on the Ernst & Young audit was filed with this Commission on February 28, 2003 and progress continues on correction of issues identified by Ernst & Young in its audit of SBC's performance measures.⁹ However, present plans for the ongoing BearingPoint testing do not project completion of these activities until June, 2003. It should also be noted that these project plans are, by agreement of the parties, stated as zero-defect project plans. Based on previous

⁷Specifically the Commission concluded that for Section 271 purposes, SBC relies upon approximately 40% of the performance measures on which it reports on a monthly basis. The Commission found that the results of more than 85% of those disaggregations may be considered to be reliable or to have under-reported actually achieved results of the activity in question.

⁸For purposes of an accurate and complete record, the Commission would note that the DOJ's reference on page 8 of its comments to this Commission's conclusions regarding performance measures should more appropriately include the entire sentence of the cited conclusion. In its January 8, 2003 Report, the Commission indicated the following on page 76: "Although certain performance measures remain deficient and certain interfaces and processes still require additional work as specified in the accompanying order issued today, in the opinion of the Commission, when viewed in the totality, SBC's application, BearingPoint's test, and commercial usage support a positive determination in regard to Checklist Item 2."

⁹In its January 13, 2003 Report the Commission reported that 17 of the 130 issues of material noncompliance identified by Ernst & Young remained to be corrected. In the course of its ongoing audit, 3 additional items of material noncompliance have been identified bringing the total to 133. As of Ernst & Young's February 28, 2003 Report, 8 of the 133 issues remained to be corrected. Seven of these were to be corrected with February 2003 performance measure results reported in March 2003 and the last issue is to be corrected with April 2003 results reported in

testing and ongoing discussions with SBC and BearingPoint, however, it is this Commission's belief that completion of these activities may actually require considerable additional time, perhaps until year end, despite the best efforts of both SBC and BearingPoint. Nevertheless, the Commission believes that this ongoing activity need not be completed prior to Section 271 approval, as the FCC discussed in its Georgia 271 order. Ongoing testing in a thorough, thoughtful, and deliberate manner will assure that the best and most accurate procedures possible will be put into place and thoroughly tested, resulting in dependable and reliable performance measure reporting. Section 271 approval need not be held hostage to completion of these activities which might otherwise result in shortcutting the procedures which are now being pursued.

In conclusion, this Commission, in cooperation with the FCC Compliance Division, will assure that the Michigan market is irreversibly open to local competition. This issue, while extremely important, is under control and should not be the basis for denying the SBC Michigan application. The benefits to Michigan consumers of true competition in local, long distance, and bundled services far outweigh any benefit of several more months of waiting for incremental test results. The Commission has found substantial evidence on which to base its endorsement of the SBC application and does not believe denial or delay is in the public interest. Of the several issues identified in the DOJ analysis, all were addressed by this Commission in its January 13, 2003 report and these issues were resolved to this Commission's satisfaction. Furthermore, these issues are also addressed in the accompanying order issued on the same day regarding ongoing testing activity and further compliance and improvement plan obligations. The references as to where our discussion can be found for each issue follows:

- 1) Performance Measure Reliability: Report pages 5-23 and order pages 3-4.

- 2) Change Management Processes, including Working Service In Conflict Issues:¹⁰ Report pages 74-76 and order pages 9-10.
- 3) Line Loss Notification: Report pages 67-69 and order page 6.
- 4) Billing Auditability: Report pages 73-74 and order page 9.
- 5) Line Sharing/Line Splitting: Report pages 84-89 and order pages 10-11.

The Commission appreciates the mammoth undertaking of evaluating the enormous record found in the Michigan Section 271 application, comments, and the history of events as contained in the Michigan Section 271 docket, Case No. U-12320, which was accomplished in a very few weeks. Some have reached different conclusions than has this Commission. The DOJ has concluded that the Michigan market is currently open to competition and this Commission shares the DOJ concerns about whether this will be sustained. However, the Commission offers the assurance that it is committed to competition and that it has the tools in place, including confidence in the performance measurement data and accompanying remedy and compliance plans, to keep the market open.

C. Directory Assistance Listing Prices

The Commission reiterates its conclusion that SBC is in compliance with checklist item 7 and, in particular, that its prices for access to directory assistance listings (DAL) services are compliant with the requirements of Section 271 of the FTA. Issues related to directory assistance (DA) services and DAL services have been addressed during the last four years in at least five docketed proceedings before this Commission and in court appeals of some of the orders issued in those

¹⁰As AT&T indicated in its comments on the Working Service In Conflict (WSIC) Issue when it was raised with this Commission on November 15, 2002, “While the actual difficulties relating to WSIC are important, we would like to focus the Commission’s attention on the change management aspect of this issue.” Joint Affidavit of Walter W. Willard and Rebecca L. Webber, ¶54. Thus, the Commission addressed this issue in the context of its change management assessment.

proceedings as well. Issues addressed include the costs of each of these services,¹¹ whether the services are unbundled network elements (UNEs) and must therefore be priced at cost, and the degree to which these services are offered on a wholesale and/or retail basis, including the effect of this determination on cost studies. This Commission has determined that customized routing compliant with the requirements of the FTA and the FCC is not offered by SBC in Michigan.¹² Based on that determination, this Commission has required that both DA wholesale services and DAL services (which are only wholesale services) be offered at TSLRIC-based rates.¹³ The final outcome of these determinations and court appeals of portions of these decisions is that SBC submitted a tariff for DAL services in April, 2002, including TSLRIC-based prices, and the Commission in its January 2003 report on Section 271 checklist compliance found that the tariff complied with the Commission's orders.¹⁴ The TSLRIC study for DA services was included with SBC's original TSLRIC cost studies submitted in Case No. U-11831 on January 21, 1999. In November 1999, the Commission issued an order in that proceeding specifying that certain cost studies had yet to be submitted and those included a TSLRIC study for DAL services. In response to that order, a DAL services cost study was submitted in December 1999. On August 31, 2000, an order in this cost proceeding further found that a DA service cost study must be consistent across wholesale and retail services. Revised cost studies filed on October 2, 2000 in response to that

¹¹The directory assistance listing service provides for initial and update datafiles of all customer listings in the state or a subset of residential or business listings only. Directory assistance service is offered on both a wholesale and retail basis and provides end user customers with access to individual directory listings from the company's database.

¹²See, March 19, 2001 order in Case No. U-12622, p. 16-22.

¹³See, March 19, 2001 order in Case No. U-12622, p. 22, December 20, 2001 order in Case No. U-12320, p. 16, and March 29, 2002 order in Case No. U-12320.

order included a wholesale DA services cost study but did not adjust the December 1999 TSLRIC study for DAL services, presumably because it was SBC's belief that DAL service (the bulk DA download of its entire DA database) was purely a wholesale service and therefore unaffected by the Commission's August 31, 2000 ruling. No comments were filed by parties in response to the unchanged DAL portions of the October 2000 cost study nor in response to the revised DA services cost study, and further revisions were therefore not required by the Commission in regard to either DA or DAL service cost studies.

Two issues therefore remained at that time: whether a tariff compliant with the DAL TSLRIC cost study would be filed (because SBC continued to contest the Commission's determination that DAL and DA services were UNEs) and the submission of a complete retail cost study for DA services consistent with the wholesale study submitted in October 2000. The retail DA service cost study, consistent with the Case No. U-11831 October 2000 wholesale study, was filed in March 2002 as a result of a retail DA rate proceeding.¹⁵ The DAL tariff based on the 1999 DAL cost study was submitted in April 2002 as a result of the Commission's order addressing 14-point checklist deficiencies issued in December 2001.¹⁶ As a result, the Commission has found that SBC is compliant with its orders to offer DAL services as an unbundled network element at

¹⁴A wholesale DA service tariff had previously also been filed, including TSLRIC-based rates that the Commission has also found compliant with Section 271 requirements.

¹⁵The February 1, 2002 Commission order in Case No. U-13007 required the submission of a DA services cost study within 30 days of the date of the order. The cost study was filed in March, 2002.

¹⁶Prices included in that tariff included a recurring charge of \$0.028 per listing for the DAL initial load and for a DAL update, a monthly DAL update charge of \$1,258.69, and a non-recurring DAL Set-Up Charge of \$5,096.30. This tariff may be reviewed on-line at the following link: http://www.sbc.com/public_affairs/regulatory_documents/tariffs/1,5932,281,00.html?pid=312. The rates are contained in Part 19, Section 14, Original Sheet No. 6 of Tariff M.P.S.C. No. 20R. It should also be noted that WorldCom and other CLECs purchase these services pursuant to

TSLRIC-based rates. SBC complies with the requirements of the Section 271 checklist in this regard.

D. Closed but Not Satisfied BearingPoint Exceptions

Finally, the Commission clarifies for the record that its January 13, 2003 order specified that any outstanding exceptions and observations open as of the date of the order in BearingPoint's transactions and procedures tests should continue until satisfactory results are achieved as determined by BearingPoint or are closed as determined by the Commission and its Staff.¹⁷ In response to the comments of some parties, the Commission also recognizes that a number of BearingPoint exceptions in the transactions and procedures tests were closed prior to the date of the Commission order in a "not satisfied" condition. The Commission also notes, however, that these "not satisfied" exceptions resulted in failed testing criteria in BearingPoint's October 31, 2003 Report and all of these failures were addressed in the Commission's January 13, 2003 Report. Although the Commission required compliance and improvement plans in regard to some of these items as discussed above, the Commission found that in consideration of the totality of the circumstances related to each of the checklist items, none of these failed criteria resulted in a determination of non-compliance with Section 271 checklist requirements.

E. Conclusion

As determined in its January 13, 2003 Report and as recommended to the FCC on January 29, 2003, this Commission concluded, based on the information submitted in its Section 271 proceeding and on information from other related proceedings, that SBC has complied with Section 271(c)

negotiated interconnection agreements which may, by agreement of the providers, include prices which differ from the tariffed rates.

¹⁷One billing procedure exception and two transaction observations on mean-time-to-repair and

of the FTA. The Commission's conclusion remains unchanged. We recommend that the FCC grant SBC's Section 271 application.

on pre-order responses presently remain in a retest mode in Michigan.